

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KAREN GINSBURG, et al.,

Plaintiffs,

v.

COMCAST CABLE
COMMUNICATIONS MANAGEMENT
LLC,

Defendant.

CASE NO. C11-1959RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on a motion from Plaintiffs Karen Ginsburg and Jessica Walker for partial summary judgment. Oral argument is unnecessary. For the reasons stated below, the court DENIES the motion. Dkt. # 114.

II. BACKGROUND

The court has described this case in previous orders, most recently in two orders addressing Plaintiffs' efforts to pursue this case on behalf of a class of all customer account executives ("CAEs") at the three Washington call centers that Defendant Comcast Cable Communications Management, LLC ("Comcast") operates. Briefly, Plaintiffs, whose primary responsibility was to answer phone calls from Comcast customers, contend that they began essentially every day they worked by working for Comcast without pay. They sued, invoking various Washington statutes that permit employees to recover unpaid wages.

1 The primary evidence supporting Plaintiffs' claims is their own testimony that
2 they began virtually every one of their daily shifts by working off the clock. They
3 contend that Comcast required them to be prepared to take customer phone calls at the
4 beginning of their scheduled shifts. To be ready, however, they needed to log in to their
5 computers, initiate several software programs that were necessary for receiving calls, log
6 in to Comcast's phone system, and read emails and Comcast daily bulletins. Comcast
7 provided a paid "preshift" period during at least part of each Plaintiff's tenure, but
8 Plaintiffs testified that the five- or ten-minute preshift period was inadequate to complete
9 the tasks necessary to begin taking customer calls. Plaintiffs submitted no evidence of
10 any specific day on which they performed uncompensated work. They did not, for
11 example, submit daily time records. Instead, the only evidence corroborating their
12 testimony is a brief declaration from Dr. Robert Abbott, a statistician who compared data
13 revealing the time at which every CAE logged into his or her Comcast computer each day
14 with data revealing the time that his or her shift began. Dr. Abbott previously performed
15 these calculations for hundreds of CAEs in support of Plaintiffs' efforts to certify a class.
16 Now he has narrowed his analysis to Ms. Walker and Ms. Ginsburg. He contends that
17 Ms. Ginsburg logged into her computer a cumulative total of 222.83 hours before the
18 beginning of her paid shift over the 392 days on which she worked (an average of about
19 34 minutes per day) and that Ms. Walker logged in a cumulative total of 37.18 hours
20 early over the 133 days on which she worked (an average of about 17 minutes per day).

21 Plaintiffs testified that various supervisors and trainers either directly instructed
22 them to begin their workday by performing tasks before their paid work began or
23 demanded the completion of tasks that Plaintiffs could not complete without working off
24 the clock. Every trainer or supervisor who Plaintiffs identified denies Plaintiffs'
25 allegations.

26 Plaintiffs claim that the court can decide, as a matter of law, that they worked time
27 for which Comcast did not compensate them, and that Comcast is liable. They do not

1 contend that the court can decide as a matter of law how much uncompensated time they
2 worked.

3 III. ANALYSIS

4 On a motion for summary judgment, the court must draw all inferences from the
5 admissible evidence in the light most favorable to the non-moving party. *Addisu v. Fred*
6 *Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment is appropriate
7 where there is no genuine issue of material fact and the moving party is entitled to
8 judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party must initially show
9 the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,
10 323 (1986). The opposing party must then show a genuine issue of fact for trial.
11 *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The
12 opposing party must present probative evidence to support its claim or defense. *Intel*
13 *Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). The
14 court defers to neither party in resolving purely legal questions. *See Bendixen v.*
15 *Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999).

16 A. Plaintiffs Have Not Provided Evidence Sufficient to Demonstrate Comcast's 17 Liability Under Any Washington Statute.

18 The court begins its analysis of Plaintiffs' motion by observing that although they
19 request that the court hold Comcast liable "under Washington law," they do not specify
20 which Washington law. That matters not only because plaintiffs ought generally be
21 specific when asking the court to declare a defendant in violation of the law, but because
22 the standards applicable to Comcast's alleged wrongdoing may vary depending on the
23 law that its alleged wrongdoing violates. Both parties focus on the Washington
24 Minimum Wage Act (RCW Ch. 49.46, "MWA") and the federal Fair Labor Standards
25 Act ("FLSA"), to the extent it is persuasive in interpreting the MWA. *See Innis v. Tandy*
26 *Corp.*, 7 P.3d 807, 811 (Wash. 2000) (federal regulations and decisions interpreting
27 FLSA are persuasive authority for Washington courts interpreting the MWA); *Tift v.*

1 *Prof. Nursing Servs., Inc.*, 886 P.2d 1158, 1162 (Wash. Ct. App. 1995) (“Because the
2 MWA is based upon the Federal Fair Labor Standards Act of 1938 . . . federal cases and
3 interpretations are deemed to be persuasive but not controlling upon Washington
4 courts.”). The MWA, however, does not govern an employer’s obligation to pay an
5 employee whatever hourly wage they have negotiated, it merely requires payment of a
6 minimum hourly wage. *SPEEA v. Boeing Co.*, 991 P.2d 1126, 1132 (Wash. 2000) (“The
7 WMWA directs an employer to pay an employee not less than a minimum wage. RCW
8 49.46.020. Nowhere does it guarantee an employee be paid his or her negotiated wage,
9 nor does it provide any remedy for an employer’s failure to pay an employee for all time
10 worked.”) Plaintiffs present no evidence that they were paid less than Washington’s
11 minimum wage. In contrast to its silence as to an employer’s obligation to pay straight
12 time wages above minimum wage, the MWA does obligate an employer to pay one-and-
13 a-half times an employee’s negotiated wage for overtime. *SPEEA*, 991 P.2d at 1132 &
14 n.5; RCW § 49.46.130(1) (“[N]o employer shall employ any of his or her employees for a
15 work week longer than forty hours unless such employee receives compensation for his
16 or her employment in excess of the hours above specified at a rate not less than one and
17 one-half times the regular rate at which he or she is employed.”). Plaintiffs present no
18 evidence, however, that they worked overtime in any week. In short, Plaintiffs’ motion
19 gives the court no basis for holding Defendants liable for a violation of the MWA.

20 There are other Washington statutes that obligate an employer to pay an employee
21 her regular wages. Plaintiffs invoked a few of them in their complaint (*e.g.*, RCW
22 § 49.48.010 (requiring an employer to pay wages owed at termination of employment),
23 RCW § 49.52.050 (making employers liable for willful failure to pay wages)), but did not
24 refer to any of them in their motion for summary judgment. Moreover, Plaintiffs cited no
25 authority establishing that the MWA’s standards for determining what work is
26 compensable apply to these other statutes. For these reasons, the court cannot grant
27 Plaintiffs’ summary judgment motion.

1 **B. Disputed Issues of Fact Prevent Summary Judgment as to Whether Plaintiffs**
2 **Performed Uncompensated Work Within the Meaning of the MWA.**

3 Because the parties do not mention Plaintiffs' failure to offer evidence that
4 Comcast paid them less than minimum wage or failed to pay them overtime, the court
5 construes the motion before it as a request for partial summary judgment on a question
6 that is inadequate by itself to establish Comcast's liability: whether Plaintiffs performed
uncompensated work within the meaning of the MWA.

7 The MWA requires employers to pay a minimum hourly wage for all hours an
8 employee works and to pay overtime and one-and-half times any rate of pay. *Stevens v.*
9 *Brink's Home Security, Inc.*, 169 P.3d 473, 475 (Wash. 2007); RCW §§ 49.46.020,
10 49.46.130. MWA regulations define "[h]ours worked" as "all hours during which the
11 employee is authorized or required by the employer to be on duty on the employer's
12 premises or at a prescribed work place." Wash. Admin. Code ("WAC") § 296-126-
13 002(8). The Washington Department of Labor and Industries has interpreted the
14 regulatory definition to encompass "all work requested, suffered, permitted, or allowed,"
15 including "preparatory time." L&I Emp. Std. ES.C.2. It is not enough for an employee
16 to work, the employer must "know or have reason to believe" that the employee worked.
17 L&I Emp. Std. ES.C.2.

18 Disputed facts prevent the court from deciding whether Plaintiffs performed
19 uncompensated work within the meaning of the MWA. Comcast has not offered
20 evidence to contradict Plaintiffs' testimony that they began performing work before the
21 scheduled start of their shifts. To be sure, there is evidence that both Plaintiffs sometimes
22 began their day by checking personal email or with other personal tasks. That evidence is
23 insufficient to contradict Plaintiffs' testimony that there were at least some days when
24 they performed Comcast work without being paid. What Comcast has offered, however,
25 is evidence from every person who Plaintiffs identified as a supervisor or trainer. They
26 uniformly declare that they never instructed Plaintiffs to perform uncompensated work
27 before their shifts began, that they were not physically positioned to determine whether

1 Plaintiffs were working before their shifts began, that Plaintiffs never requested
2 compensation for work before their shifts began, and that nothing else alerted them that
3 Plaintiffs were performing uncompensated work. They also declare that they had no
4 access to the Comcast network to determine employees' computer log-in times.¹
5 Moreover, with one exception, there is no evidence that Plaintiffs informed Comcast of
6 the work they performed without compensation. Ms. Walker testified that she never
7 attempted to report time before the beginning of her scheduled shift, albeit because she
8 contends that her trainers and supervisors made it clear that she should not bother. Ms.
9 Ginsburg contends that she attempted to record time before her shift began, and that one
10 of her supervisors altered her time records. The supervisor denies those assertions. Other
11 than that single incident, there is no evidence that Ms. Ginsburg informed any superior
12 about her uncompensated time.

13 IV. CONCLUSION

14 For the reasons stated above, the court DENIES Plaintiffs' motion for partial
15 summary judgment. Dkt. # 114.

16 Dated this 13th day of January, 2014.

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20 The Honorable Richard A. Jones
21 United States District Court Judge
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24 ¹ Plaintiffs insist that Comcast can be charged, as a matter of law, with knowledge of the
25 difference between the computer log-in times and Plaintiffs' scheduled shift times. The court
26 disagrees, as it has explained in its past orders. A jury must decide whether an employer in
27 Comcast's position should have known about this discrepancy, and whether it should have led
28 Comcast to conclude that Plaintiffs were performing uncompensated work. The court has also
previously rejected Plaintiffs' assertion that logging in to their Comcast computers commenced
their work day even if they logged in to conduct personal business.